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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~341~~

VERNON ZIMMERMAN,
Petitioner,

vs.

MISSISSIPPI VALLEY BARGE LINE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

THE WITHIN PROCEEDINGS PRESENTED UNDER THE ACT OF JUNE 25, 1948, c. 646, 28 U. S. C., PAR. 1916, PERMITTING APPEAL WITHOUT PREPAYMENT OF COSTS OR FURNISHING SECURITY THEREFOR.

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MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Vernon Zimmerman, a seaman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 14, 1964.

Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania has not been reported. A copy of it is appended hereto as Appendix A at pages 24-32.

The opinion of the United States Court of Appeals for the Third Circuit has not been reported as yet. A copy of it is appended hereto as Appendix D at pages 47,48.

Grounds for Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 14, 1964.

Jurisdiction to issue a writ of certiorari is conferred on this Court by the Act of June 25, 1940, c. 646, 62 Stat. 928, Title 28, U. S. C. § 1254(1).

Questions Presented for Review

1. May highly prejudicial, non-medical, hearsay contained in a hospital record be admitted as a business record? Affirmed below.

2. May Veteran Hospital records, not in evidence, be used to cross examine the seaman plaintiff? Affirmed below.

3. In a seaman's action asserting Jones Act and unseaworthiness liability, may a District trial Judge refuse to define unseaworthiness, the Jones Act or the seaman's rights thereunder in the jury charge? Affirmed below.

4. May a medical witness use unauthenticated X-rays, of which he has no personal knowledge, as a basis for an opinion as to the seaman's physical condition? Affirmed below.

5. Where in the Court's charge of over 500 lines, 132 lines relate to the "bar" of the release, and only 16 lines relate to pain, suffering and inconvenience, should the seaman plaintiff have a new trial? Denied below.

6. Is appellant entitled to a new trial? Denied below.

Statutory Provisions Involved

(1) The Jones Act, the Act of June 5, 1920, c. 250 § 33, 41 Stat. 1007, Title 46 U. S. C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

(2) *United States Business Records as Evidence* Statute:

> "§ 1732. Record made in regular course of business; photographic copies.
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight,

but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413."

(3) Purdon's Pennsylvania Statutes Annotated:

"§ 98. Records, etc., of department of health.

Copies of all records, documents, and papers in the possession of the department of health, or of any bureau, division, or officer thereof, when duly certified by the commissioner of health, under the seal of the de-

partment of health,[1] shall be received in evidence in the several courts of this commonwealth in all cases where the original records, documents, and papers would be admitted in evidence, with the same force and effect as the originals. 1907, May 29, P. L. 305 § 1.

§ 121. Federal official records; admissibility.

A book of records regularly kept by any public officer of the United States, when acting under any law or regulation or other authority, is admissible to evidence any matter recorded therein and pertaining to the duties of the office. 1951, May 24, P. L. 393, § 1.

§ 122. Federal miscellaneous documents; certified copies of official records; authentication.

A book of records made by any public officer of the United States and kept in a public office, when itself relevant and admissible for any purpose, may be evidenced, without producing the original, by a copy certified by the officer or his deputy having lawful custody thereof under the seal of the office, if there be a seal, or if not, then under the seal of the United States court of the district in which the office is located. 1951 May 24, P. L. 393, § 2.

§ 142. Uniform construction.

This act[2] shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. 1951, Sept. 26, P. L. 1458 § 2."

Statement of the Case

Appellant seaman seeks a new trial, after verdict and judgment for the appellee, defendant below, affirmed by the Third Circuit Court of Appeals.

The appellant seaman admittedly was injured in a fall on an unseaworthy barge in tow of appellee's motor vessel

[1] Now Secretary of Health, see section 65 of Title 71, State Government.
[2] Sections 141-143 of this title.

while in the course of his employment. The fall was due to an open, almost square hole in the working area of the deck, obviously cut out, unguarded, and large enough for appellant's leg to fall through as he backed, pulling a line. Absolutely no attempt was made upon the trial to justify or explain the hole, or to deny the fall or injury.

The action was based upon the unseaworthiness of the barge, and negligence of the appellee shipowner; a second cause was joined for maintenance and cure.

Before starting the trial, in accordance with the then prevailing rule and practice in the Court below, the learned trial Judge advised counsel that the maintenance and cure cause would be adjudicated by him following the jury verdict. Accordingly, appellant's counsel omitted any reference to maintenance and cure in his opening speech. During the trial, questioning of the plaintiff as to maintenance and cure was permitted by the judge and, thereafter, the maintenance and cure cause also submitted to the jury.

Although a release was pleaded in the Answer, it had not been marked, listed or offered as an exhibit by appellee at pre-trial, as required by Rule 5-II of the District Court; yet it was, over objection, admitted as an exhibit for the Appellee (Test. 96).

X-ray negatives, not authenticated by anyone having taken same or having official custody of same, were admitted, over objection, to give ground for a defense doctor to render an opinion thereon adverse to appellant. (X-ray rejected at pp. 191, 193, then admitted p. 206 of the original transcript.)

U. S. Public Health Service Hospital records, containing fantastic hearsay, having nothing to do with treatment, but

insultingly critical to appellant were, *in toto* admitted, over objection (Original Transcript 344, 354, 356, 357).

The learned District Judge omitted any reference whatever to the law of unseaworthiness in his charge; nor was the Jones Act or its provisions referred to.

Although the District Court charged (Orig. Transcr. 373-374-375) that: "It is the burden of the plaintiff to establish * * * his right to recover", not a word was given the jury as to the law on the warranty of seaworthiness and the admitted "right" of the plaintiff under the evidence to recover damages.

Over one fourth of the District Court's 500 line charge emphasized the "bar" of the release, if "voluntarily and knowingly" executed. The repeated references to the "bar" of the release are spread throughout the charge (Test. 363, 364, 365, 372, 374, 375, 379, 380). Just 16 lines of the charge related to pain, suffering and inconvenience. It was undenied that the appellant had no legal advice, nor was there discussion concerning his rights under the seaworthiness doctrine, when the release was executed (Test. 269).

The District Court's charge on the law of maintenance and cure as well as on forfeiture thereof was excepted to, and appellant's request for specific instruction as to his right as a seaman to work under disability without forfeiture of his maintenance, denied (Orig. Transcr. 381).

The Third Circuit Court of Appeals affirmed the District Court's refusal of a new trial.

Reasons Relied on for the Allowance of the Writ

I. The conflict of laws of the Circuits in the interpretation of the federal Business Records as Evidence statutes has resulted in lack of uniformity and discriminatory application in seamen's actions.

The rights of a seaman under the doctrine of seaworthiness, his right to maintenance and cure and his statutory rights under the Jones Act are all federal rights which should, regardless of the district in which said rights are asserted, be uniformly enforced and protected. The rules of evidence, particularly insofar as competency, relevancy, materiality and, conversely, and exclusionary rules of hearsay and best evidence, with their respective exceptions, generally applicable, should be uniformly invoked and applied, if uniform and non-discriminatory judgments are to be expected in these cases.

The Third Circuit Court of Appeals has ignored both admissibility and exclusionary rules in permitting into evidence entire records whether the contents thereof are pertinent, germane, or otherwise competent to the relationship of the case issues, and regardless of the prejudicial effect upon the party litigant, under the aegis of the federal Business Records as Evidence Act. Its decision sustaining the District Court on such prejudicial admission into evidence of the United States Public Health Service record followed the Circuit decisions theretofore established in *Bartkoski vs. Pgh. and Lake Erie RR Co.*, 172 F. 2d 1007 (1949) and *Norwood vs. Great American Indemnity Co.*, 146 F. 2d 797 (1944). The District of Columbia Circuit in *Wheeler vs. United States*, 211 F. 2d 19, 22-23 (1953); the Second Circuit in *White vs. Zutell*, 263 F. 2d 613 following earlier cases of like holding, support the Third Circuit Court holdings.

In direct conflict with and more compatible with the Rules of Evidence which have proved themselves to be safeguards of fairness and justice in judicial proceedings are holdings of the Fifth Circuit in *Mullican vs. United States*, 252 F. 2d 398, 404, following *England vs. United States*, 174 F. 2d 466, and *Missouri Pacific RR Co. vs. Soileau*, 265 F. 2d 90, 94; and the Sixth Circuit in *Baltimore and Ohio RR Co. vs. O'Neill*, 211 F. 2d 190, reversed on other ground 348 U. S. 956; and *Ranger, Inc. vs. Equitable Life Assurance Soc. of U. S.*, 196 F. 2d 968, 972.

In *Thomas vs. Hogan*, 308 F. 2d 355 (1962), it is pointed out that the Seventh, Eighth and Ninth Circuits, as well as the Fourth Circuit have interpreted the "Shop Book Rule" statutes as abandoning to a large extent the hearsay evidence rule insofar as such records are concerned, regardless of the pertinence, relevance, materiality or competence of such matters to be in the record.

Such conflict alone among the Circuits, especially in those Circuits, including the Third Circuit, where prejudicial matter admittedly hearsay and otherwise incompetent, is entered into the record along with the competent portions thereof, the party affected is certainly at a great disadvantage and relatively less likely to obtain a fair consideration of the substantive claim than if the cause were tried in a forum excluding such prejudicial matters. This conflict has, therefore, resulted in a lack of uniformity.

Under the more liberal view which the law has accorded seamen in our Federal Courts, it is urged that the well considered judgment of *Continental Packing Co. vs. United States*, 281 F. 2d 137, wherein it is held that the contents of the record, even if qualified for admissibility under the "Shop Book Rule" must be competent and relevant.

In *New York Life Insurance Co. vs. Taylor*, 147 F. 2d 297, at page 300, the Court, in referring to the Shop Book Rule, says:

> "A literal reading of the above statute would make the records in this case admissible on the theory that the business of operating a hospital requires records of the histories of patients, reports of unusual conduct and also diagnoses by physicians. But the Supreme Court in Palmer v. Hoffman,* has, we believe, limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent routine reflections of day-to-day operations. The opinion in that case holds that the statute is not one 'which opens wide the door to avoidance of cross examination.'"

In *Norwood vs. Great American Indemnity Co., supra*, at page 800, hospital records of the Brooklyn Naval Hospital including the autopsy report were, over objection, admitted into evidence relying upon *Reed vs. Order of United Commercial Travelers of America*, 123 F. 2d 252, 253, Second Circuit; *Ulm vs. Moore-McCormack Lines, Inc.*, Second Circuit, cert. den. 313 U. S. 567, etc.; however, the Court therein followed the rule of *Paxos vs. Jarka Corp.*, 314 Pa. 148, 153, wherein three prerequisities to admissibility of the records were required, namely, (1) that the records were made contemporaneously with the acts to which they purport to relate; (2) at the time of making, it was impossible to anticipate reasons which might subsequently arise from making a false entry in the original; and (3) the knowledge of the person responsible for the entry must be established. These have been followed in Pennsylvania in *Rockwell vs. Stone*, 404 Pa. 561.

The District Court, over objection, admitted into evidence the entire contents of the U. S. P. H. S. Hospital at Memphis, Tennessee (Orig. Transcr. 344, etc.).

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*1943, 318 U. S. 109, 63 S. Ct. 477, 481, 87 L. Ed. 645, 144 A. L. R. 719.

It has long been recognized that such records, themselves exceptions to the hearsay rule, even when authenticated, do not contain only competent, relevant and pertinent data. Entries made by internes, for example, are not always admissible; *Waples v. Police Beneficiary Assn.*, 156 Pa. Super. 592; *Lane v. Samuels*, 350 Pa. 446.

Where the entries in the record are not "germane to treatment", it had been the "universal rule" that they should be excluded from the evidence; *McDermott v. Barker*, 237 N. Y. S. 2d 598.

Counsel for the appellant objected (Orig. Transcr. 344) to admission of said record (Exhibit B), insofar as non-related, non-medical, prejudicial remarks contained therein. This objection was overruled and the entire record admitted including the very prejudicial references (Orig. Transcr. 354) to appellant's "incompatibility" with the physical therapist; his personal "business" in the hospital; and, even more detrimental (Orig. Transcr. 356), reference to his "abuse of the therapist with vile, filthy language" "in the presence of a female—"; and that the appellant "threatened to punch the therapist". All these notations were obviously not made by the "therapist" (unidentified) but by another unidentified "L. Sidel" (Orig. Transcr. 357).

There was only one purpose in the offer of such hearsay —to prejudice the jury against the appellant; and, it succeeded!

The learned Trial Court apparently forgot its dual role of guardian of the seaman at this point.

II. The Court of Appeals erred in sustaining the prejudicial admission into evidence of an unauthenticated X-ray upon which a physician predicated his "expert" opinion that a disabling spinal compression fracture pre-existed the injury.

Certainly the admission into evidence of the prejudicial hearsay incorporated in the authenticated United States Public Health Service Hospital, if proper under the rulings of the Third Circuit, was enough of a burden for the appellant seaman to overcome in pursuit of his federal remedies upon trial; however, the very basis of his claim that he had sustained a compression fracture of the spine was effectively defeated by admission of an unauthenticated X-ray produced by the appellee's "expert" physician, who did not attend or treat appellant, who was not a staff member of the hospital where the seaman was treated (about 200 miles away from the "expert's" office); who did not know the person, place or qualification of the X-ray technician who produced same; and who admittedly could not have expressed his adverse opinion without use of the X-ray.

The policy of the law of the United States is demonstrated in the provision of 38 U. S. C. 3301 which declares that records of veteran administration hospitals, even though authenticated, cannot be put into evidence in a civil action; NOR CAN THE PLAINTIFF BE CROSS EXAMINED AS TO THE CONTENTS; *Payette v. Sterle*, 21 Cal. Rep. 22, Cal. App. 1962.

The Uniform Business Records as Evidence Act, of May 4, 1939, P. L. 42, and the Federal Official Records Act of May 24, 1951, 28 P. S. Par. 121-128, require that the record be admissible only "*if the custodian or other qualified witness testifies to its identity and mode of its preparation,*

and if it was made in the regular course of business * * *", etc. (28 P. S. par. 916).

The 1951 Pa. Statute relating to admissibility of official Federal records in evidence in state courts also requires that such record be first "certified by the lawful custodian of the records of that office, under seal of the office".

The latter act does not here apply, since Mason District Hospital is not a federal institution.

After properly rejecting the unauthenticated X-rays of that hospital (Orig. Transcr. 191, 193, 206); the learned Court below was prevailed upon by appellee's counsel to admit same into evidence (Orig. Transcr. 206). This single error gave the defense its much needed substance for its Dr. Conrad's otherwise unsupported opinion that the compression fracture, admittedly existing, antedated the accident here involved. Admittedly, this doctor, confronted by his report indicating the absolute necessity of a series of X-rays for verification of his suspicion that the compression fracture pre-existed the fall, could not have gone on to express his strong opinion adverse to appellant's cause without this X-ray (Orig. Transcr. 226, 227).

This doctor witness, who required an unauthenticated hospital record and X-rays to bolster his opinion, admits, furthermore, that he received no permission from the appellant for release of these records (Orig. Transcr. 219).

This doctor witness, admittedly used by the appellee for examination of the appellant soley for testifying in court (Orig. Transcr. 223) was thus not only permitted to use unauthenticated records not made by himself, but improperly released records as a basis for his opinion, in absolute violation of the prevailing law; 32 C. J. S. Evidence, par. 536, pp. 259-60; 20 Am. Jur. Evidence, par. 866; Anno. 65 A. L. R. 1217.

It is not at all difficult to assess the importance of this error to appellant's cause, since without the testimony of Dr. Conrad on the "preexistence" of the compression fracture, it is admitted by the appellee that the release was for an inadequate consideration (Orig. Transcr. 316).

III. The overemphasis in the charge on the bar of the release was prejudicial to plaintiff.

Apparently, the learned Court below had in mind the Pennsylvania law of release, rather than that of the federal maritime law; for the charge was delivered with repeated reference to the "validity" of the release as a bar to a verdict for the appellant; and the term "validity" was tied in with "knowingly" in such manner as to infer that if the appellant knew he was signing a release, the release was a valid bar to any recovery. One hundred thirty-two lines of the charge relate to and specifically refer to the release and its bar to a recovery. This is well over one fourth of the entire charge; but its effect is far greater, because the repeated references are spread ominously throughout the entire charge (Orig. Transcr. 363, 364, 365, 368, 372, 373, 374, 375, 377, 379, 380).

In rejecting the limitation of liability clause in a contract of a seaman's employment, the Fourth Circuit Court of Appeals in *Blanco v. Phoenix Compania De Navigacion*, 304 F. 2d 13, 1962, the learned authority on maritime rights, Chief Judge Sobeloff declared that "The Admiralty Court would be derelict in its duty to honor this agreement" where in a private agreement, as here, the seaman surrenders "his substantial right to recover full indemnity for any loss or damages suffered in consequence of the unseaworthiness of his ship".

The burden on the appellee pleading a release is not only to prove that the release was executed "voluntarily and knowingly" (Charge, Orig. Transcr. 372), but the defendant below must prove also that the seaman was fully advised of or aware of his physical condition and legal rights.

It is well-settled law that,

> "the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seamen with full understanding of his rights." *Garrett v. Moore-McCormack Company, Inc.*, 317 U. S. 239, 247 (1942); See also, I Norris, *The Law of Seamen*, § 502 (1951).

While inadequacy of consideration in and of itself may be ground for setting aside the release (*German v. Carnegie-Illinois Steel Co.*, C. C. A. 3, 1948, 169 F. 2d 715; *Garrero v. Farrell Lines*, 1958 A. M. C. 498) where the seaman has not been advised of his legal rights (here admitted by witness Klene, (Orig. Transcr. 269) how can the jury be permitted to conjecture as to whether he "knew" he was releasing those rights?

The appellant seaman had a right to his maintenance and cure, and to his wages for the period he would have worked except for his injury. If he was paid in full for these items, where is the consideration for the release of his larger rights to damages under the Jones Act and the doctrine of seaworthiness?

The Supreme Court in *Maynard v. Durham and Southern Railway Co.*, 365 U. S. 160, at 164, 81 S. Ct. 561, 563, 1961 specifically rules that "If—an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid"; *Hogue v. Natl. Autom. Parts Assn.*, D. C. 87 F. S. 816, 821.

Especially where the learned Trial Court admitted the release not previously listed as an exhibit, nor a copy filed anywhere in the pleadings, over objection (Test. 96), should the Court have been careful to see that this document was executed only upon full advice to this seaman of his rights. The seaman had no opportunity to examine in advance of trial, and should not be trapped at trial by such admissions into evidence.

In a case decided by the Pennsylvania Supreme Court on May 11, 1964, rehearing denied June 29, 1964, the lower court was reversed for failure to give a "balanced" charge on the law and facts; *Kimmel v. Yellow Cab Co.*, 201 A. 2d 417.

As previously pointed out, only sixteen lines out of the over five hundred line charge were devoted to appellant's lawful right to damages for pain, suffering and inconvenience.

Recently, the Fourth Circuit Court of Appeals in *Ballwanz v. Isthmian Lines*, 319 F. 2d 457, 4th U. S. Court of Appeals, 1963, calls attention to the requirement that a charge should not deemphasize any important issue in the case.

IV. The charge erroneously confined plaintiff's right to recover for injuries which were only "the direct result" of the fall (Test. 369).

In effect, the Pennsylvania "proximate cause" rule was applied, instead of the law of the sea. Actually, if appellee's negligence (or unseaworthiness) played any part, even the slightest, in producing injury, the seaman would be entitled to recover; *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539; *Rogers v. Mo. Pac. R. R. Co.*, 352 U. S. 500.

V. The charge of the learned Court as to maintenance and cure, and as to forfeiture thereof was erroneous.

Aside from the confusion created by the use of the word "compensation" (Orig. Transcr. 360, 363) as a measure of the seaman's right of recovery, it is submitted that the reference to maintenance and cure as being "exacted" from the shipowner-employer was highly prejudicial to the appellant.

Bouvier defines "exaction" as

> "a willful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.
>
> Between extortion and exaction there is little difference."

"Compensation" is commonly understood as payment under the state compensation law.

Since the Court found as an admitted fact and matter of law that the vessel was unseaworthy, is not the right of the seaman "indemnification"? *Blanco v. Phoenix Compania, etc.*, 304 F. 2d 13, 1962.

It is respectfully further submitted that the charge of the learned Court was misleading and contrary to law when (Orig. Transcr. 367) the jury was advised that defendant's "obligation to provide maintenance and cure has been met by the tendering of hospitalization".

Likewise (Orig. Transcr. 366) the Court erred in charging that the jury could find that the seaman forfeited his right to maintenance and cure if he "stands in the way of or declines hospital treatment calculated to improve his condition".

The learned Trial Court was supplied in advance of trial with a memorandum of law as to forfeiture, as well as

being reminded of the inadequacy of the charge before the case was given to the jury (Orig. Transcr. 381).

A seaman may forfeit his right to maintenance by only the following acts:

1. Desertion from the ship during voyage.

2. Willful misbehavior causing his injury.

3. Concealment of the disabling affliction predating his hire.

Neither of these "defenses" were pleaded or are here applicable. They do constitute affirmative defenses and must be pleaded if relied on; *Norris, Volume 1, par. 557.*

Contributory negligence of the seaman will not forfeit his maintenance and cure.

"A seaman can receive his wages, maintenance and cure although his illness or injury arises through his own fault, negligence or lack of prudence"; *Norris, Volume 1, par. 549; The Tawmie*, 80 F. 2d 792 (CCA 5, 1936); *The New York*, 204 F. 764 (CCA 2, 1913); *Paul v. U. S.*, 54 F. S. 60, 1943 A. M. C. 1438 (DC La. 1943).

Mere issuance of a master's certificate to the seaman is not enough; *Spellman v. Am. Barge Line Co.*, 172 F. 2d 716 CCA 3, 1949.

VI. A new trial should be granted for failure and refusal of the District Judge to instruct the jury on the doctrine of seaworthiness and the Jones Act, and the seaman's rights thereunder.

Especially since the learned District Judge found that the barge whereon the seaman appellant was injured was unseaworthy as a matter of law, and from the undisputed

exhibits and evidence, the jury should have been charged as to the law on unseaworthiness, the Jones Act, and the injured seaman's rights. The learned Court below did not even define seaworthiness; nor were the provisions of the Jones Act told to the jury. Actually, at page 362 of the original record (362-363) (of the charge as set out in the appendix to appellant's brief) Hon. Herbert P. Sorg stated to the jury:

"It isn't necessary to go into the background of all of the law. For our present purposes it should suffice to say that under all the evidence, the stipulations, the admissions and the applicable law, the plaintiff became entitled to *compensation* for whatever injuries he sustained as a result of the accident, concerning which you have heard evidence." (Italics added).

Appellant believes this is a misstatement of the law, and leaves the jury without any understanding of the importance of a warranty of seaworthiness in the eyes of the law or of the Congressional mandate to a shipowner employer under the Jones Act. Especially since our courts sit as guardians of the rights of seamen in maritime cases, the jury should be fully advised of the law giving rise to those rights.

Jury trials in federal courts are conducted as at common law when the Constitution was adopted; and the judge is considered "governor of the trial" with an "inescapable duty to fully and correctly instruct the jury on the applicable law of the case"; and such duty is not fulfilled by "mere abstract statements or legal definitions, but only by a fair and impartial statement of the factual issues and law applicable thereto"; *Tyler v. Dowell, Inc., C. A. N. M.* 1960, 274 F. 2d 890, cert. den. 80 S. Ct. 1248, 363 U. S. 812.

A jury must be instructed on the legal standards to apply in determining issues of fact; *Merchant's Fast Motor Lines, Inc., v. Lane, C. A. Tex.* 1958, 259 F. 2d 336 cert. den. 79 S. Ct. 651, 359 U. S. 935.

A "charge failing to advise on all points of law involved is erroneous"; *88 Corp. Jur. Sec.; Trials; Par. 371, p. 950, note 19; Smith v. Kappas*, 15 S. E. 2d 375, 219 N. C. 850.

Especially since seaworthiness is a warranty, as distinguished from negligence concepts, the failure of the Court to instruct on the law or even define the term as applied to the facts, was error.

The learned Trial Court should not have presumed that the jury knew the responsibility of the defendant under the law, or the rights of the plaintiff under the doctrine of seaworthiness. *The rights of the plaintiff were the very essence of this case.*

Even for the jury's consideration of the validity of the objectionable release as a defense, the jury should have been instructed on the rights of a seaman under the law of the case; moreover, it should have been told that under the evidence it could not find that the plaintiff knew, or was informed of such rights. There was no such evidence. Contrariwise, there was evidence that the plaintiff was *not* informed of his rights (Orig. Transcr. 269, 272, 313, 314) when he executed the release. The learned Court nevertheless instructed the jury that it "may take into consideration the adequacy of the amount paid in determining whether or not the plaintiff had full knowledge and understanding of his rights at the time the release was executed" (Orig. Transcr. 365).

Such instruction alone probably constitutes reversible error; *Mandel v. P. R. Co.*, 291 F. 2d 433, cert. den. 82

S. Ct. 379, 368 U. S. 938, 7 L. Ed. 2d 337 wherein it was held reversible error to instruct the jury that it may determine if there was negligence in the swaying of the railroad car, in the absence of evidence thereon; *Thomas v. Tomay*, 196 A. 2d 740, January, 1964.

Certainly the instruction as given was inclined to lead the jury to attach to a part (the consideration for the release) of the evidence a significance which such evidence lacked; and, where otherwise unsupported in the evidence on the issue of plaintiff's knowledge of his rights, such charge constitutes reversible error; *Hearst Corp. v. Cuneo Press, Inc., C. A. Ind.* 1961, 291 F. 2d 714.

The learned Court apparently assumed that the defendant, in admitting the accident and the unseaworthiness of the barge, thereby limited the submissible issues to the damages and the validity of the release in regard thereto, (Orig. Transcr. 362, 363).

The sole matters upon which instructions were given the jury were damages, credibility, burden of proof and release. On the "damage" elements of maintenance and cure and forfeiture thereof, some instruction was given, and some denied. A very minimal reference was made to the plaintiff's *right to damages for pain, suffering and inconvenience (a total of sixteen lines, out of over five hundred lines in the charge).*

The charge likewise omitted reference to the Jones Act, the learned Court apparently assuming that no negligence need be established where unseaworthiness is admitted. The fact that the case was entered in the alternative, however, should have entitled the plaintiff to have the jury instructed on his rights under the Jones Act as well.

Unseaworthiness is equated with negligence; *Skovgaard v. The M/V Tungus*, 252 F. 2d 14, 358 U. S. 588; *Halecki v. United, etc.*, 251 F. 2d 708, 358 U. S. 588; *Mahnich v. Southern S. S. Co.*, 321 U. S. 96.

The double-barrelled rights of seaman in such circumstances should be clarified to a jury.

Here no reference whatever was made to the liability of the defendant under either the doctrine of seaworthiness or the Jones Act. We respectfully submit that without pointing out the basis for his rights in law, the "authority" of the Court's charge on damages consequent to viollation of plaintiff's lawful rights is weakened in the minds of the jurors.

The failure to charge on the law as aforesaid, coupled with the errors during the trial hereafter referred to and the mistaken and improvident use of language in respect to other aspects of plaintiff's right to maintenance and cure as a matter of status and contract law rather than as an "exaction" (Orig. Transcr. 365, 366) against the defendant, deprived this seaman of a fair trial.

Conclusion

The basic conflict in the interpretation of the Shop Book Rule which in the Third Circuit has adversely affected the federal rights of the appellant seaman, and which, if erroneously applied, has deprived the said appellant of a fair trial, should, it is respectfully submitted, be reviewed by the Supreme Court and the conflict resolved.

Aside from the importance of the foregoing, the other errors in this case compounded the adverse effect of the prejudicial admission aforesaid so as to deprive the appellant seaman of the fundamentals of a fair trial.

WHEREFORE, it is prayed that certiorari be allowed herein.

Respectfully submitted,

S. ELDRIDGE SAMPLINER,
HARRY ALAN SHERMAN,
Counsel for Petitioner.

APPENDICES

APPENDIX A

Opinion

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

VERNON ZIMMERMAN,

Plaintiff,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation,

Defendant.

Civil No. 61-567.

This is an action for damages for personal injuries sustained on March 22, 1960 when plaintiff, a seaman, fell in a hole in the deck of defendant's barge. Plaintiff claims damages based upon the unseaworthiness of the barge and the provisions of the Jones Act, 46 U. S. C. A. § 688, as well as for maintenance and cure. At the trial defendant admitted that the barge was unseaworthy but contended that plaintiff had released all claims against it arising from the accident. Both claims were submitted to the jury which returned a verdict in favor of the defendant. Judgment was entered in favor of defendant on February 27, 1963. Plaintiff now moves for a new trial, advancing the general contentions that the verdict was against the law and the

evidence, that the verdict was "the result of trial errors objected to by plaintiff" and was "improperly influenced by erroneous rulings of the learned trial judge, duly excepted to," as well as the following:

"5. The learned Trial Judge erred in the following specific particulars:

(a) In admitting into evidence over objection prejudicial hearsay and improper entries in the hospital record offered by defendant.

(b) In submitting to the jury for special verdict a determination as to the amount due plaintiff for maintenance and cure without adequate or proper instruction as to the definition of maintenance and cure and plaintiff's right thereto.

(c) In refusing to instruct the jury in accordance with request of plaintiff's counsel that maintenance could be recoverable under the evidence even though the plaintiff was employed elsewhere.

(d) In failing and refusing to define unseaworthiness and plaintiff's rights under said doctrine to the jury.

(e) In failing to properly instruct the jury on the burden upon defendant pleading release.

(f) In admitting into evidence a release not exhibited, identified or marked prior to trial, and over objection.

(g) In failing to instruct the jury as to the Jones Act, and plaintiff's rights thereunder."

On July 12, 1963, some four and one-half months after the entry of judgment, plaintiff moved to amend his motion for a new trial to add the following reason therefor:

"8. The trial herein erroneously separated the maintenance and cure action from the Jones Act and unseaworthiness causes contrary to the mandate of the

Appendix A.

Supreme Court of the United States in Thomas I. Fitzgerald, Public Administrator of the County of New York, etc., Petr. vs. United States Lines Company, 83 S. Ct. 1646, June 10, 1963, thereby denying plaintiff his right to trial by jury."

The accident took place on March 22, 1960. Plaintiff sustained a sprain of his left knee and a contusion of the right elbow, and he claimed that he also sustained a compression fracture of the second lumbar vertebra. Defendant contended, and produced evidence intended to establish that the compression fracture antedated the accident. On March 23, 1960, he was admitted to the Mason District Hospital at Havana, Illinois. X-rays of his knee and lumbar spine and pelvis were taken and he was released the same day. On March 31, 1960, he was admitted to the United States Public Health Service Hospital at Memphis, Tennessee, from which he received a disciplinary discharge on April 6, 1960. From April 18, 1960 through May 25, 1960, he was employed by Commercial Transport as a deckhand on a vessel. In July of 1960 he was employed as a deckhand for American Commercial Barge Line. While so employed, on July 27, 1960, he injured his eye for which he received maintenance and cure through November 17, 1960. From October, 1960 through March 1961 he worked at various times as a truck driver for several employers and is presently employed as a pilot on a vessel.

From March 23, 1960 to June 10, 1960, defendant made eight separate payments to plaintiff totaling $564.85. On June 17, 1960 defendant paid plaintiff $800.00 and plaintiff signed a release, stated to be in the amount of $1241.00, of all claims arising from the March 22 accident.

As set forth in subparagraphs d and g of his motion, plaintiff contends that the court erred in failing to define

in its charge unseaworthiness and plaintiff's rights both under that doctrine and under the Jones Act. In this case the defendant admitted that the barge upon which plaintiff was injured was unseaworthy at the time of the accident and that it was responsible for whatever injuries plaintiff sustained as a result thereof. In this connection the court charged the jury as follows:

> "'It isn't necessary to go into the background of all of the law. For our present purposes, it should suffice to say that under all the evidence, the stipulations, the admissions and the applicable law, the plaintiff became entitled to compensation for whatever injuries he sustained as a result of the accident concerning which you have heard evidence.''

In a later part of its instructions, the court instructed the jury to consider, as elements of damage, maintenance and cure, lost wages to the time of trial, loss of future earning power, and pain, suffering and inconvenience, and the court described for the jury the standards to be applied in connection with each of the various items of damage. Under these circumstances a dissertation on the doctrine of unseaworthiness and of the concept of comparative negligence under the Jones Act would have been redundant and would not have added to the jury's understanding of plaintiff's rights under the circumstances of the case.

Plaintiff contends that the court erred in admitting into evidence certain portions of the hospital records of the Public Health Service Hospital at Memphis which made reference to his altercations with and the use of abusive language toward the physical therapist while a patient at the hospital. Plaintiff asserts that the entries were not made by the therapist and that they were non-medical and prejudicial. It was not disputed that the records were of

plaintiff's confinement as a patient at the Memphis Hospital and that they were made in the regular course of the hospital's business. In such case "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." 28 U. S. C. A. § 1732. According to the hospital records, plaintiff received a disciplinary discharge because of his refusal to take prescribed physical therapy treatments and because of personal difficulties with the therapist. Plaintiff's conduct at the hospital and the reasons for his discharge were relevant in connection with the defendant's obligation to furnish medical treatment and of plaintiff's rejection of the proffered treatment. These were matters which the jury was entitled to consider in evaluating plaintiff's rights to receive payments for maintenance and cure.

In his brief, plaintiff contends that the court erred in admitting into evidence certain X-rays from the Mason District Hospital which he asserts were not properly authenticated. It may be noted that this matter was not set forth as one of the grounds for plaintiff's motion. In any event, Dr. Conrad who examined plaintiff on behalf of the defendant, testified that the X-rays in question were received by him from Mason District Hospital in response to his request for them. The Mason Hospital records included an X-ray report, dated March 23, 1960, on X-ray No. 60-C-113, and the same number, together with plaintiff's name, the name of the hospital, and the same date, appeared upon each of the individual X-rays. In addition, Dr. Conrad testified that based on comparison with other X-rays which were in evidence, these were X-rays

of the plaintiff. Under these circumstances, the court is of the opinion that the X-rays were properly authenticated.

In subparagraph (e) of his motion, plaintiff contends that the court erred "in failing to properly instruct the jury on the burden upon defendant pleading release." In his brief plaintiff asserts that the court overemphasized the bar of the release by devoting one hundred thirty two lines or over one fourth of its charge thereto.

In this connection the jury was instructed as follows: "* * * the defendant has the burden of establishing that the release is valid or, in other words, the settlement was negotiated and the release was executed freely and without deception or collusion of any kind, and moreover, the release must have been fairly arrived at and fully comprehended by the plaintiff and he must have had a full understanding of his rights." The court further instructed the jury to consider "whether or not the amount he received in settlement of his claim was adequate in view of the nature of his injuries," and the "nature of the medical and legal advice available to him at the time the settlement was negotiated and the release was executed." This was in accordance with the prevailing law. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Thompson v. Coastal Oil Co., 221 F. 2d 559 (3 Cir. 1955); German v. Carnegie-Illinois Steel Corporation, 169 F. 2d 715 (3 Cir. 1948). Whether or not plaintiff had released his claims for damages arising from the accident was one of the central issues in the case. In instructing the jury on this or any other issue, the court does not feel that it should have limited itself to some pre-determined quota of lines which the instructions thereon may occupy in the reporter's

transcript nor does it believe that such an arbitrary standard should be applied.

Plaintiff asserts both in his motion and his brief that the release was not marked as an exhibit prior to trial. However, in its answer to the complaint, in its pretrial statement, in answers to plaintiff's interrogatories, and at the pretrial conference, defendant fully disclosed to plaintiff that it was relying upon the settlement and release as a defense to his various claims. Plaintiff was therefore not surprised by the introduction and admission of the document at the trial.

Plaintiff contends that the court's charge on maintenance and cure was erroneous. In his brief he asserts that the court erred in charging the jury that plaintiff could forfeit his rights to maintenance and cure by rejecting hospital treatment. In this connection the jury was instructed in accordance with the principles stated in Macris v. Sociedad Martima San Nicolas, S. A., 245 F. 2d 708 (3 Cir. 1957) as follows:

> "Generally a refusal by a seaman of proffered care and treatment discharges the obligation of maintenance and cure. Bailey v. City of New York, 2 Cir., 1946, 153 F. 2d 427; The Saguache, 2 Cir., 1940, 112 F. 2d 482. Exceptions to this rule exist, when reasonable grounds for refusing care are shown. Luth v. Palmer Shipping Corp., 3 Cir., 1954, 210 F. 2d 224."

Plaintiff also asserts that the court erred in not instructing the jury that plaintiff was entitled to payments for maintenance and cure while he was employed. The court charged the jury that plaintiff was entitled to a reasonable amount on a daily basis for maintenance and cure during his disability until he reached the point of maxi-

mum cure, excepting only time spent by him in a hospital. The court did not instruct the jury to reduce any award by the amount of wages plaintiff received while elsewhere employed. Moreover, there is no evidence that defendant refused to pay maintenance and cure while plaintiff was employed on another vessel nor that plaintiff's employment was not motivated by personal choice rather than for reasons of economic stress. See Vaughn v. Atkinson, 369 U. S. 527 (1961).

In his amended motion for a new trial, plaintiff contends that the court erroneously separated the maintenance and cure action from the Jones Act and unseaworthiness claims thereby denying him his right to trial by jury. In his brief he claims that he was "deprived of his right to refer to maintenance and cure in his opening statement by a ruling withholding the case from the jury (later changed during trial)." It may be noted that the amended motion, filed some four and one-half months after the entry of judgment, was far from timely under Rule 59 of the Federal Rules of Civil Procedure. Moreover, as plaintiff's counsel is well aware, the court's tentative ruling, made at the beginning of trial, to try the maintenance and cure claims without a jury was in response to a motion by counsel for the plaintiff and over defendant's vigorous objection. Under these circumstances plaintiff's position at the time of the opening statement was of his own making. In addition, it is abundantly clear that plaintiff's claim for maintenance and cure was submitted to the jury and passed upon by it in reaching its verdict and plaintiff was not deprived of trial by jury on this issue.

Plaintiff has set forth several other objections in his brief concerning certain phraseology used by the court

in its charge and the failure of the court to give sufficient emphasis to his claim for damages for pain and suffering. These matters were not set forth by plaintiff in his motion nor was timely objection made thereto at the time of trial. However, the court has carefully considered them and believes them to be without merit.

Plaintiff's motion for a new trial will be denied.

S/ HERBERT P. SORG, *P. J.*

Dated: December 31, 1963.

APPENDIX B

Order

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

VERNON ZIMMERMAN,

Plaintiff.

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation,

Defendant.

Civil No. 61-567.

AND NOW, this 31st day of December, 1963, plaintiff's motion for a new trial is hereby denied.

s/ HERBERT P. SORG,
D. J.

APPENDIX C

Pertinent Excerpts from Trial Record.

* * *

[Tr. Tr. Page 191] A. I did.

Q. And I take it that you reported your findings to him?

A. Yes. When Mr. Klene called to make the appointment he told me that he was anxious to know the results of the examination and he asked me to call him when I finished, which I did.

Q. And then, subsequently, you sent him a written report?

A. That's correct.

Q. Doctor, I wonder if we could have you step down here and get this thing set up, this shadow box?

A. Yes.

Q. Now, in this envelope, I take it, is your set of X-rays, is that right, the ones that were taken by you?

A. That's correct.

Q. And the remaining ones in here were the ones taken at the Mason District Hospital, is that correct?

Mr. Sherman: Just a moment. If your Honor please, I object to this. It has not been properly proved that these X-rays were taken at Mason District Hospital. I object to the question and I object to the conclusion. I don't know whether these were or weren't, but certainly no evidence that they were. No one here

* * *

[Tr. Tr. Page 193] By Mr. Martin:

Q. Will you tell me, Doctor, how these X-rays came into your possession?

A. They were sent to me in response to a request from the hospital for the X-rays.

Q. In other words, you wrote the hospital and asked them for the X-rays, is that correct?

Mr. Sherman: If your Honor please, I object further that unless authority was given by the patient to release the X-rays, it's highly irregular that anyone would be known to release them.

The Court: Are these the only X-rays you have, Mr. Martin?

Mr. Martin: These are the X-rays that were taken the day after the accident.

The Court: The objection is sustained. They are not properly authenticated.

Mr. Martin: May I, out of the hearing of the jury, put on the record the additional matter which I think does authenticate them.

The Court: All right. Very well. The court will recess for five minutes.

(Whereupon, the following proceedings were had in chambers.)

Mr. Martin: If the court please, these X-rays,

* * *

[Tr. Tr. Page 206] (In open court.)

Mr. Martin: If the court please, I offered in evidence in connection with the examination of the doctor, Defendant's Exhibit D, which is the X-ray report of the Mason District Hospital, which was obtained from the plaintiff's pretrial statement.

The Court: The exhibit is admitted.

Appendix C.

DIRECT EXAMINATION of Dr. Conrad Resumed by Mr. Martin:

Q. Doctor, I show you Exhibit D. You have already told us that these X-rays were sent to you by the Mason District Hospital, is that correct.

A. That's correct.

Q. And comparing the X-rays, as you have examined them previously, and that report, does the report correspond with the X-rays that you received?

A. It does, with the exception of reference to the developmental abnormality which I noticed.

Q. Well, maybe you better read us the X-ray report of the hospital?

A. It is dated March 24, 1960. "Left knee, there is no evidence of fracture, dislocation, bone or joint pathology about the left knee. Diagnosis: Negative. Lumbar spine and pelvis: There is straightening of the normal lumbar lordosis. There is a compression deformity of the body of L2 with some irregularity of the superior

* * *

[Tr. Tr. Page 219] they were really taken there, except what you saw, an identification on certain X-rays that you received, is that right?

A. That's correct. They were sent to me from this hospital.

Q. At your request?

A. Yes, sir.

Q. Did you get any authorization from the plaintiff, the patient, to have them released to you?

A. I didn't have any, no.

Q. But they nevertheless accommodated you?

A. Yes, sir.

Q. Now, in looking at this X-ray—and I have no doubt as to what you say as to where you got them, you use the term, this X-ray, that it was a healed compression fracture. Now, you didn't see that in the X-ray report of the roentgenologist here, did you?

A. No, sir.

Q. Now, sir, you didn't see also that there was an abnormal or congenital back condition found in the X-rays that were taken at the Mason Hospital, as you say you found a year later, did you?

A. It's there on those films, too.

Q. Doctor, would you please tell me whether the report of the roentgenologist who took those X-rays and

* * *

[Tr. Tr. Page 223] Mr. Sherman: May the record show that we were not furnished a copy of such report in the pretrial proceedings or at any other time prior to this time.

The Court: The record shows it.

By Mr. Sherman:

Q. Now, Doctor, you do a lot of examining for Traveler's Insurance Company, don't you?

A. Yes, sir.

Q. And you don't do it for the purpose of treating a patient, do you?

A. Most frequently, yes, sir, I do.

Q. For Traveler's Insurance Company?

A. Yes, sir.

Q. You were in this case doing it for the purpose of helping them in this case, isn't that correct?

A. Yes, sir. There was no treatment involved.

Q. Doctor, would you say that it is significant that when you looked or when you examined this man in 1960 that there was no difference in the circumferential measurements of his two lower extremeties, legs, and now there is found to be by Dr. DeRoy's measurements a quarter to a half inch atrophying in—

Mr. Martin: Just a minute. Dr. DeRoy didn't testify to any measurement of the leg that you're talking about. It was Dr. Turner who so testified.

* * *

[Tr. Tr. Page 226] but I would estimate that it would be two or $300.

Q. Doctor, in 1960, June 17, 1960, when you made your report to the Traveler's Insurance Company, attention of Mr. Klene, you stated that you are not sure that this was an old compression fracture and you said that you could only come to a definite conclusion on the basis of repeated examinations.

Did you make any repeated examinations yourself?

Mr. Martin: Just a minute please, that contains two questions. Mr. Sherman's interpretation of what the doctor said may or may not be what he said, and then there is another question—.

Mr. Sherman: I will reframe the question.

By Mr. Sherman:

Q. Doctor, did you sign this report?

A. Yes, sir.

Q. And it says here, in the next to the last paragraph, "This probably anti-dates the injury described above, but the only way a definite conclusion could be made would be on the basis of repeated examinations." Is that what you said, Doctor?

A. That's what I said.

Q. Did you make repeated examinations?

A. I didn't make a repeated examination, but I got the earlier film from the Mason District Hospital.

[Tr. Tr. Page 227] Q. Why didn't you say, Doctor, that it depended on whether you could get some old X-rays somewhere else? Why didn't you use that term instead of "Repeated examinations"?

A. At the time I looked at this report I didn't know there had been prior X-rays made.

Q. You mean you hadn't been told he had been in the hospital?

A. In the Public Health Hospital.

Q. Well, don't you know that they take plenty of X-rays in Public Health Service Hospitals?

A. Yes, sir, as a rule, they do.

Q. Then, you did know there were previous X-rays taken, didn't you, Doctor?

A. No, sir, I didn't know there were previous X-rays.

Q. You have seamen examined lots of times, don't you? You know what a seaman is, don't you?

A. Yes.

Q. Now, like Mr. Zimmerman, a seaman, and Traveler's Insurance Company asks you to examine seamen repeatedly, don't they?

A. Yes, sir.

Q. And you know seamen go to Public Health Service Hospitals as guests of the United States Government?

* * *

[Tr. Tr. Page 269] Q. You think you did, but you are not sure, is that correct?

A. It is a matter of policy that I always told the seamen, "This is a maintenance and cure payment to subsist you."

Q. All right. We heard you say that.

Now, I'm asking you, sir, did you ever tell Mr. Zimmerman that, aside from his right to maintenance and cure, the law gives him rights for unseaworthiness injuries and for Jones Act rights? Did you tell him that?

A. I did not.

Q. Do you know what the Jones Act is?

A. I know what the Jones Act is.

Q. What?

A. Yes.

Q. You know what it is?

A. Yes.

Q. Will you tell the members of the jury what the Jones Act is?

A. It is a special act that was enacted by the United States to protect the seaman, and under—

Q. Against what?

Mr. Martin: Let him finish his answer.

By Mr. Sherman:

Q. To protect the seaman against what?

* * *

[Tr. Tr. Page 272] Q. At any rate, you did not discuss this doctrine with Mr. Zimmerman?

A. I did not.

Q. Did you at any time tell Mr. Zimmerman, "You better get a lawyer," to get some legal advice on his rights?

A. I did not.

Q. And this $4.50, the arbitrary figure that you used, you know that the Traveler's Insurance Company and all

the insurance companies that deal with seamen pay a lot more than that for maintenance and cure, daily rate?

A. I don't know that.

Q. You don't know that?

A. I don't know that.

Q. Do you know what the National going rate is for a day?

Mr. Martin: Just a moment. If the court please, the national going rate that Mr. Sherman is referring to is arrived at by contract between certain deep sea unions and the people who are dealing with them and has nothing to do with this.

Mr. Sherman: The question simply asks whether he knows the national going rate for maintenance and cure per day.

* * *

[Tr. Tr. Page 313] introduced him to Mr. Davenport?

A. That's right.

Q. For Mr. Davenport to "take care of him," right?

A. That's right.

Q. When you were talking about getting a settlement, only you were present with him, right?

A. That's right.

Q. Didn't yo bring a witness over?

A. No. There was nobody there but him and me, close to my desk.

Q. No doctor to advise him as to the possibility of his back condition.

A. There was nobody there but him and me.

Q. And certainly no lawyer representing Mr. Zimmerman?

A. That's right.

Q. And did you tell him that he had a right to file a suit in Federal Court under Federal law when you knew that you had an unseaworthy vessel in which he was injured? Did you explain that to him?

A. I did. I'm sure he mentioned Mr. Sampliner's name during the course of the discussion, and I told him that Mr. Sampliner was very competent and that if he wanted to have him handle the case, it was all right with me, that he did not have to take a settlement.

[Tr. Tr. Page 314] Q. Did you think to call Mr. Sampliner?

A. No, sir.

Q. To ask whether it was all right for you to discuss settlement with a man of this man's limited education?

A. I had no reason to believe that Mr. Sampliner was interested in the case.

Q. And, yet, this morning I heard in your examination that you had some authority to examine Mr. Sampliner's medical reports, dated April, 1960, two months before you settled this.

A. Which were turend over by Mr. Sampliner to our Chicago office in October, 1961.

Q. That is the first time you saw these?

A. Yes, sir.

Q. All right, sir.

Now, since that is the first time you saw any authority to get any of Mr. Zimmerman's medical records, I want to ask you—

Mr. Martin: Just a minute. That is contrary to the testimony. He said that's the first time he saw these particular authorizations was—

Mr. Sherman: I'm sure the court and jury remember everything that was testified to.

The Court: Did your question presume that the first time this witness ever saw any authorization was—

[Tr. Tr. Page 344] The Court: Do you wish to have an objection, to have an objection to the records?

Mr. Sherman: Oh, yes.

The Court: All right. Put it on.

Mr. Sherman: Counsel for the defendant has offered the records of the Memphis Public Health Service Hospital, consisting of a covering letter and 24 photostatic pages, and, if your Honor please, I object to those portions of the record which contain pure hearsay, conclusions and opinions by persons whose qualifications, whose authority and whose rights, to enter such notations upon the record have not been established. Further, because the conclusions and opinions therein contained are made in the words of the person making the notations and not in the words of the patient, that they are not specific and that they are highly prejudicial to the character of the plaintiff and do not relate to the medical reasons for the plaintiff being in the hospital, being diagnosed, being treated, or for the reason of not treating him.

I have no objections to those authenticated portions of the record which indicate relevant portions and competent portions showing his admission to the hospital, and observation for medical purposes, the notes in relation to such observations, the treatment,

the diagnoses, if substantiated by the qualified doctor in

* * *

[Tr. Tr. Page 354] mild. Lumbar strain, mild. Obesity, exogenous.

"Comments and recommedations: A disciplinary discharge was given on the basis of the patient's incompatibility with the physical therapist as well as his refusal to do the prescribed treatments. The patient's reasons for not going to physical therapy were 'business' on the wards, such as long distance calls, filling out forms, *et cetera*. The initial impression of this patient on admission was that of a mild knee and low back strain and after approximately five days in the hospital, this was confirmed by physical findings. It was felt that this patient partially exaggerated some of his symptoms and findings as proven by the examination of the back and knee several days after admission. Since this patient was discharged on a disciplinary basis, no duty status will be given at this time."

Mr. Sherman: The date of the report is 4/18/60, correct?

Mr. Martin: Yes. That's the date the doctor signed it, and it was signed by C. D. Pittard, S. A. surgeon, "whatever, S. A." means, I don't know.

Mr. Sherman: I think you added something inadvertently. You said it was signed on that date. The only thing we know about it is that that is the date of the report.

* * *

Appendix C.

[Tr. Tr. Page 356] "Lumbar spine: minimal degenerative bone and joint changes are present. There is questionable narrowing of the fifth lumbar disc space. There is a transitional vertebra present which is thought to represent partial lumbarization of the first sacral segment. No other bone or joint abnormality is noted." That is signed by B. M. Brady.

And then we have routine laboratory reports. Next, physical therapy report and the dates are 1, 4, 5 and 6, "non-luminous heat". On the same dates, "Whirlpool hydrotherapy."

On the next page, we have, "The patient was issued a cane and instructed in it's use. He complains of acute low back and left knee pain. He is unable to extend the left knee against gravity. His trunk movements are extremely guarded and limited." That is signed by L. Sidel.

"4/6/60: Patient today called therapist from the ward phone and stated he was too busy filling out papers to take his treatment. Dr. Pittard was notified of this and sent the patient to the clinic. When the patient arrived at the clinic he abused the therapist with vile, filthy language. When the therapist asked the patient to be quiet as he was in the presence of a female as well as other male patients, he threatened to punch the therapist. Upon this threat the therapist notified the physician, who asked to see the patient." It's signed, "L. Sidel."

[Tr. Tr. Page 357] Page 18 starts with doctor's progress notes. "The first entry is 3 31 60, at 5 p. m.: 24 year old white male, able seaman fell into hold of boat on 3 22 60 sustaining injuries to low back and left

knee. Pain in both areas following injury and seen at St. Louis as outpatient on 3/24/60—given tablets for pain and transfer admission form to this hospital. Patient ambulant and in no acute distress—does have some pain to left knee with ambulation." I couldn't read that signature to save my soul.

"4/1/60: Patient has such a painful left knee that examination is impossible, will be supplementally. Back has mild pain.

"4/2/60: Examination again today reveals an essentially normal knee. Movement of knee normal except will not extend to 180 degrees because of 'pain'. I am not impressed that patient has a severe injury." That is signed "P", I think.

Mr. Sherman: Yes. It looks like a P.

Mr. Martin: To Page 19, still the doctor's progress notes. The entry of 4/4/60, "Patient improving *re* pain in knee and back. States he cannot sleep at night because of back pain. However, patient is up and

* * *

APPENDIX D

Opinion of the Court

(Filed May 14, 1964)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,774

VERNON E. ZIMMERMAN,

Appellant,

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued April 14, 1964.

Before BIGGS, *Chief Judge*, and HASTIE, *Circuit Judge*, and KIRKPATRICK, *District Judge*.

PER CURIAM.

We have examined the record in this case and the briefs of the parties and have weighed the arguments of counsel. We have scrutinized the charge of the trial judge which the plaintiff-appellant contends was unfair or illegal in a num-

ber of respects. We find nothing that will support such allegations. We are convinced that no prejudicial error occurred in the proceedings below. Consequently, the judgment appealed from will be affirmed.

A true Copy:

Teste:

.....,

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX E

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,774

VERNON E ZIMMERMAN,
Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Before BIGGS, *Chief Judge*, and HASTIE, *Circuit Judge*, and KIRKPATRICK, *District Judge*.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 27, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF
Clerk.

May 14, 1964.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 341

VERNON ZIMMERMAN, *Petitioner*

v.

MISSISSIPPI VALLEY BARGE LINE, CO., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No.

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MISSISSIPPI VALLEY BARGE LINE, CO., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 14, 1964, affirming the judgment of the United States District Court for the Western District of Pennsylvania entered on February 27, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is set forth at pages 24-32 of Appendix A of petitioner's brief. The opinion of the United States Court of Appeals for the Third Circuit is reported at 331 F.2d 308.

QUESTION PRESENTED

Whether the decision of the Court of Appeals is in substantial conflict with decisions of other Circuits relating to the admission into evidence and use of records under the Federal Shop Book Statute.

STATUTES INVOLVED

(1) The Jones Act, The Act of June 5, 1920, c. 250 § 33, 41 Stat. 1007, Title 46 U. S. C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

(2) United States Business Records as Evidence Statute:

> Title 28 U. S. C. § 1732.
>
> Record made in regular course of business photographic copies.
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or

record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

STATEMENT

Petitioner brought his action in the United States District Court for the Western District of Pennsylvania for injuries allegedly received when he stepped into a hole on a barge owned by respondent. The claim was based on the Jones Act, 46 U.S.C.A. § 688, unseaworthiness under maritime law and for maintenance and cure.

Petitioner sustained a sprain of his left knee and a contusion of the right elbow, and he claimed that he also sustained a compression fracture of the second lumbar vertebra. Respondent contended and produced evidence intended to establish that the compression fracture antedated the accident. (App. A of Petition, 26)

The day following the accident, petitioner was admitted to the Mason District Hospital at Havana, Illinois. X-rays of his knee, lumbar spine and pelvis were taken and he was released the same day. On March 31, 1960, he was admitted to the United States Public Health Service Hospital at Memphis, Tennessee, from which he received a disciplinary discharge on April 6, 1960. From April 18, 1960 through March

of 1961 petitioner was employed at various times as a deckhand and truck driver. While so employed, on July 27, 1960, he injured his eye for which he received maintenance and cure through November 17, 1960. As of December 31, 1963, he was employed as a pilot on a vessel (App. A of Petition, 26).

From March [illegible], 1960 to June 10, 1960, respondent made payments to petitioner totaling $441.00 (R-292). In June 17, 1960 respondent paid petitioner $800.00 and petitioner signed a release, stated to be in the amount of $1,241.00, of all claims arising from the accident (App. A of Petition, 26).

Respondent admitted that the vessel in question was unseaworthy and pleaded the release in bar of petitioner's claims.

The trial Judge instructed the jury that as a matter of law the petitioner was entitled to be compensated for whatever injuries he sustained as a result of the accident (R 362-363), specifying that the petitioner was entitled to recover, as elements of damage, maintenance and cure, lost wages to the time of trial, loss of future earning power, and pain, suffering and inconvenience, and the court described for the jury the standards to be applied in connection with each of the various items of damage (App. A of Petition, 27).

In its answer to complaint, in its pretrial statement, in answers to interrogatories, and at the pretrial conference respondent fully disclosed to petitioner that it was relying upon settlement and release as a defense to his various claims. (App. A of Petition, 30).

The court made a tentative ruling at the beginning of the trial in response to a motion by petitioner, and over respondent's vigorous objection, to try the maintenance and cure claims without a jury (App. A of

Petition, 31). However, at the close of the evidence, the Judge inquired of both counsel if there was any evidence to go before the jury if the maintenance and cure claim were to be submitted to the jury. There was none. In light of this, the court changed its previous ruling and decided to submit the question of maintenance and cure to the jury as being a necessary part of determining the validity of the release. Petitioner offered no objection (R 341).

The jury returned a verdict in favor of respondent. Petitioner's motion for a new trial was denied and the Circuit Court of Appeals affirmed.

ARGUMENT

I. The Decision of the Court of Appeals for the Third Circuit Is Not in Conflict With the Decisions of Another Court of Appeals on the Same Matter.

In an effort to gain favorable consideration of his petition, the petitioner has argued that a conflict exists in the decisions of various Courts of Appeals relating to the application of the Federal Shop-Book Act, 28 USCA § 1732. However, the claimed conflict in no way relates to the case at bar

While the petitioner argued before the Court of Appeals that certain entries of the U.S.P.H.S. hospital record were inadmissible, the Court did not render a decision on this point. Instead, in its Per Curiam Opinion, the Court stated (App. D of Petition):

> "We are convinced that no prejudicial error occurred in the preceding below."

Thus, the issue of admissibility of hospital record entries under the Federal Shop-Book Act was not squarely passed upon. Rather, the opinion of the

Court of Appeals held that if error existed, it was not prejudicial.

Petitioner cited previous decisions of the Court of Appeals for the Third Circuit, *Bartkoski* v. *Pgh. and Lake-Erie R.R. Co.*, 3 Cir., 1949, 172 F2d 1007, and *Norwood* v. *Great American Indemnity Co.*, 3 Cir., 1944, 1946 F2d 797, in an attempt to bolster his argument of a conflict between Circuits. A reading of these cases clearly shows that no conflict existed as claimed prior to the decision in the case at bar. Furthermore, even if the claimed conflict did exist previous to the decision in question, the statement of this Court in *The Monrosa* v. *Carbon Black, Inc.*, 1959, 359 U.S. 180, 184 79 S. Ct. 710, 3 L.Ed.2d 723, rehearing denied 359 U.S. 999, 79 S. Ct. 1115, 3 L.Ed.2d 986 in dismissing a writ as being improvidently granted is applicable:

> "While the Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue of conflict among the Circuits] can wait a day when the issues is posed less abstractly."

II. The Decision of the Court of Appeals was Correct.

Petitioner's arguments relating to the admission of unauthenticated X-rays and claimed errors in the charge of the trial court were exhaustively briefed and argued before the District and Circuit Courts. Respondent contended below that the X-rays were properly authenticated and, if any error existed, it would be harmless because of lack of timely objection. Petitioner's argument relating to claimed errors in the trial court's charge was met by the statement that the

charge must be considered in its entirety and the extent of the amplifications in the charge rest within the trial Judge's discretion. *U. S.* v. *Bayer*, 1947, 331 U.S. 532, 536, 67 S. Ct. 1394, 91 L.Ed. 1654.

Petitioner's contentions relating to the claimed errors in the trial court's instructions as to maintenance and cure and the doctrine of seaworthiness and Jones Act are wholly without merit. The instructions were in accord with the nature of a seaman's rights set out in *Pacific Steamship Co.* v. *Peterson*, 1928, 278 U.S. 130, 138, 49 S. Ct. 75, 77, 73 L.Ed. 220, and petitioner has otherwise failed to show that they were other than in accord with established law.

The Petition in this case indicates that there were many areas of disagreement throughout the course of the trial, credibility was very much an issue, and that the trial was spiritedly contested. The opinion of the Circuit Court acknowledges this by its statement that no prejudicial error existed.

Petitioner has failed to show any compelling reason why this court should grant certiorari. His petition simply challenges the correctness of the Court of Appeals decision that if error existed, it was not prejudicial. This is not a basis for granting the writ.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HUGH LYNCH JR.
GILES J. GACA
Attorneys for Respondent

August 27, 1964